DOCKET NO. 05-30120

D.C. (Idaho) No. CR 02-79-S-BLW

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

JUAN ANTONIO ZAVALA,
Defendant-Appellant.

On Appeal from the United States District Court For the District of Idaho
Honorable B. Lynn Winmill, District Court Judge

UNITED STATES' PETITION FOR REHEARING AND FOR REHEARING EN BANC

THOMAS E. MOSS
United States Attorney
ALAN G. BURROW, Florida Bar No. 327921
Assistant United States Attorney
District of Idaho
Washington Group Plaza, Plaza IV
800 Park Boulevard, Suite 600
Boise, Idaho 83712-9903
Telephone: (208) 334-1211
Facsimile: (208) 334-9375

Counsel for Plaintiff-Appellee United States of America

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PRELIMINARY STATEMENT

In a per curiam opinion issued without oral argument, a divided panel of this Court (Tashima, Paez, JJ.; Fernandez, J., dissenting) vacated a below-Guidelines sentence on the ground that the district court "gave the Guideline calculation exaggerated weight." *United States v. Zavala,* 443 F.3d 1165, 1171 (9th Cir. 2006) (per curiam) (App. A). The panel acknowledged that the Guidelines take into account all the sentencing factors of 18 U.S.C. § 3553(a), but held that under *United States v. Booker,* 543 U.S. 220 (2005), district courts "must not accord [the Guidelines] greater weight than they accord the other § 3553(a) factors." *Id.* at 1168, 1171. According to the panel, if district courts "show . . . resistance" to moving outside the Guidelines range, they "commit legal error by misapplying § 3553(a), which now makes the Guideline a, but only a, factor to be considered." *Id.* at 1170.

En banc review is warranted because *Zavala* disregards the pivotal role the Guidelines play under *Booker*, creates a conflict with other courts of appeals, and threatens to cause considerable confusion among the district courts on the proper role of the advisory Guidelines. In speaking on what is perhaps the most significant issue in federal criminal justice today, it is vital that this Court provide

clear, correct, and useful guidance. The opinion in *Zavala* instead leaves sentencing courts at sea.

This case well illustrates the potential for confusion that the panel opinion threatens. Juan Antonio Zavala was convicted by a jury of drug trafficking (App. B, Sentencing Order, p. 1). The Guidelines prescribed a life sentence because Zavala personally sold forty-two pounds of methamphetamine, managed an extensive criminal activity, carried guns during drug deals, and had six criminal history points (*id.*, pp. 3-5).

At sentencing, the district court, after carefully examining the Guidelines range and the facts pertaining to Zavala and his offense, exercised its discretion under *Booker* to deviate from the Guidelines range and imposed a thirty-year sentence, finding that it was sufficient to accomplish the sentencing purposes of § 3553(a), and that a life sentence was "simply not necessary" (App. C, Sent. Tr., pp. 30, 33). The district court explained that

> although the Guidelines are now advisory, . . . they should provide the starting point of our evaluation, and the Court should then determine whether there is some grounds for a non-Guidelines-based departure or deviation because the Guidelines, when applied in this case, are not justified in terms of 3553(a) and all of the factors listed.

(*Id.*, p. 27.) That approach sensibly integrates the Guidelines and the other § 3553(a) factors into the sentencing court's evaluation of the case.

On appeal, the panel recognized that "the [district] court thoughtfully attended to Zavala's sentencing, considering all of the relevant § 3553(a) factors," yet vacated and remanded because "[t]he sentencing transcript leaves us with the unsettling feeling that the district court viewed the Guideline calculation not as one of several factors to be considered equally, but as a locus from which to deviate." *Zavala,* 443 F.3d at 1171. According to the panel: "Nothing in 18 U.S.C. § 3553, as it stands after *Booker*, indicates that the Guidelines are to be given any greater weight than their fellow sentencing factors." *Id.*

Sentencing courts must not be cast adrift in this fashion. The panel's approach would also make it nearly impossible to achieve the requirement in § 3553(a)(6) that sentencing courts take into account "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." The Guidelines are *the* critical tool in achieving such consistency, which was "Congress' basic goal in passing the Sentencing [Reform] Act." *Booker*, 543 U.S. at 253.

Accordingly, the United States petitions for rehearing and rehearing en banc pursuant to Fed. R. App. P. 35 and 40.

QUESTION PRESENTED

Whether a district court, when selecting an appropriate sentence, commits reversible error if it accords the properly-calculated Guidelines range greater weight than other sentencing factors listed in 18 U.S.C. § 3553(a).

STATEMENT

1. a. Juan Antonio Zavala was convicted by a jury of conspiracy to traffic in more than 500 grams of methamphetamine and distribution of fifty grams or more of methamphetamine (actual), in violation of 21 U.S.C. §§ 841 and 846 (App. B, Sentencing Order, p. 1).

b. Before sentencing, *Blakely*[1] was decided, and the Ninth Circuit issued its decision in *Ameline I*,[2] which held that *Blakely* applied to the Sentencing Guidelines. Accordingly, the district court empaneled a sentencing jury to decide various Guidelines issues (*id.*, pp. 1-2). On the second day of the sentencing trial, the Supreme Court issued its decision in *Booker,* and the parties agreed to discharge the jury and finish trying the sentencing issues to the court (*id.*, p. 2).

The court entered a sentencing order in which it found that Zavala sold 42 pounds of methamphetamine for a base offense level of 38 (*id.*, pp. 3-4). The

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[1] *Blakely v. Washington,* 542 U.S. 296 (2004).

[2] *United States v. Ameline,* 376 F.3d 967 (9th Cir. 2004).

court also found that Zavala merited a three-point enhancement for his leadership role and another two points for possessing a firearm in connection with the offenses (*id.*, pp. 4-5). Zavala's total offense level was 43, with a criminal history category of III, resulting in a life sentence (*id.*, p. 5).

At sentencing, the judge observed in his initial remarks that

> although under *Booker* the Sentencing Guidelines are advisory, the Court's discretion is not boundless, and I am required, I think, to consider the advisory Guideline range, but in the context of the goals and purposes of sentencing as reflected in 18 U.S. Code Section 3553(a). My own view is that the Guideline range becomes a presumptive sentence, and it is then for the Court to determine whether or not a specific factor exists in this case under those factors set forth in 3553(a) which would justify the Court in imposing a lesser sentence than that set forth in the Guideline range. We are not bound, of course, by the limitations on the Court's discretion, which were included in the Protect Act . . . . I do think, however, that I need to very clearly justify [b]y reference to the sentencing factors set forth in 3553(a) any departure from the Guideline range. And, therefore, I think the burden is upon, I think, the Defense to at least explain to me what those justifications are and what those factors are that will justify the Court in imposing a sentence short of life imprisonment.

(*Id.*, pp. 4-5.)

Defense counsel began his argument by noting that the judge had stated his belief that the Guidelines range provided a "presumptive sentence." (*Id.*, p. 14.)

The judge interrupted and explained, "Well, in the sense that it is a Guideline . . . the starting point." (*Id.*, pp. 14-15.) Defense counsel argued that the starting point should be the statutory mandatory minimum (*id.*, p. 15).

The judge disagreed:

> [A]lthough the Guidelines are now advisory, . . . they should provide the starting point of our evaluation, and the Court should then determine whether there is some grounds for a non-Guidelines-based departure or non-Guidelines-based deviation because the Guidelines, when applied in this case, are not justified in terms of 3553(a) and all of the factors listed.
>
> So I think the "sufficient but not greater than necessary" to accomplish those purposes really is the language which we use to answer that question of whether there is in fact a need to impose the Guideline range or something less or something more.
>
> But I think it is clear . . . that we start with the Guideline range and then work from that to determine whether there are facts in this case . . . which justify the Court in disregarding the Guideline range, or at least deviating from the Guideline range in some fashion.

(*Id.*, pp. 27-28.)

The judge evaluated the case in light of the § 3553(a) factors (*id.*, pp. 28-31) and found that a life sentence was not necessary to accomplish the statute's sentencing purposes (*id.*, p. 30-32). The judge ruled: "I am going to exercise my discretion to depart from the Guidelines or to deviate from the Guidelines based upon my consideration of the factors set forth in . . . Section 3553(a)." (*Id.*, p. 32.)

The judge sentenced Zavala to 360 months of imprisonment, ten years of supervised release, a $500 fine, and a $200 special monetary assessment (*id.*, pp. 33, 35).

2. a. Zavala appealed, contending that "his sentence was imposed in violation of law due to the district court's misconception that the calculated Guideline range was the presumptive sentence." 443 F.3d at 1167. The panel unanimously found the case suitable for decision without oral argument. *Id.* at 1165 n.*. A majority of the panel subsequently issued a per curiam opinion vacating Zavala's sentence and remanding for resentencing. *Id.* at 1166.

The majority acknowledged that *Booker* requires the sentencing court to consult the Guidelines range and summarized the task before the panel as "consider[ing] how a district court should 'consult' and use the advisory Guideline calculation when it decides a case." *Id.* at 1168. The majority distinguished the "question of whether a reviewing court should entertain a presumption that a sentencing decision which does fall within the Guideline range is reasonable," *id.*, and stated, "We have not yet opined on that question, and will not do so now. We will focus solely on the issue of how a district court should approach its duties." *Id.* at 1169.

The majority affirmed that "a district court should use the Guidelines as a 'starting point,'" *id.* (citing *United States v. Cantrell,* 433 F.3d 1269, 1280 (9th Cir. 2006)), but stated that a starting point is not the same as a presumption. *Id.* A presumption "would give undue weight to the Guidelines," *id.* at 1170, for a presumption "is much more than a mere consult for advice, and the Guidelines are to be no more than that," *id.* at 1169. The majority explained that "[e]ven though it is very likely that the Guideline calculation will yield a site within the borders of reasonable sentencing territory," the district court cannot entertain such a presumption:

> If a district court . . . show[s] a kind of resistance [to moving outside the Guidelines range] and . . . makes the Guideline calculation *the* presumptive sentence, it will commit legal error by misapplying § 3553(a), which now makes the Guideline a, but only a, factor to be considered. It will fail to embrace the discretion that it has, which is to reach the right answer . . . rather than a merely plausible answer.

Id. at 1170. Accordingly, district courts "must properly use the Guideline calculation as advisory and start there, but they must not accord it greater weight than they accord the other § 3553(a) factors." *Id.* at 1171.

Turning to Zavala's case, the majority found that the district court "thoughtfully attended to Zavala's sentencing, considering all of the relevant

§ 3553(a) factors[, a]nd yet, we cannot say with any confidence that the district court did not treat the Guideline calculation as a presumptive sentence, rather than a mere 'starting point.'" *Id.* The majority pointed out that the district court "repeatedly referred to a process of 'departing' from the Guideline range," and "placed the onus on Zavala to provide reasons for deviating downward." *Id.* Noting that "[t]he sentencing transcript leaves us with the unsettling feeling that the district court viewed the Guideline calculation not as one of several factors to be considered equally, but as a locus from which to deviate," the majority held that "the district court erred" by giving "the Guideline calculation exaggerated weight." *Id.*

The majority reviewed for harmless error and ruled without elaboration that "[t]he government cannot meet its burden of showing that the error here was harmless." *Id.* Accordingly, the majority vacated Zavala's sentence and remanded for resentencing. *Id.*

b. Judge Fernandez dissented, stating that although "the district court's language was not entirely felicitous," "it is quite clear to me that the district court simply used the Sentencing Guidelines calculation as a starting point." *Id.* at 1172. Judge Fernandez observed that the sentencing judge had explained that he meant "starting point" when he said "presumption," and that he was "merely

grasping for a label" when he said "departure," by which he meant "deviation." *Id.* Judge Fernandez deemed the majority's "presumption exegesis" "extraneous" and declined to join it. *Id.*

REASONS FOR GRANTING THE PETITION

No issue is more pressing for the district courts of this Circuit than the proper approach to sentencing under *Booker*. The opinion in *Zavala* not only threatens to prevent the advisory Guidelines from playing a proper role at sentencing, it creates profound uncertainty for district courts and departs from the approach taken by other circuits. En banc rehearing is warranted.

1. *Zavala* undermines *Booker*'s intent that the advisory Guidelines promote uniformity in the sentencing process and help avoid excessive sentencing disparities.

Booker expressly intended that the advisory Guidelines would "promote uniformity in the sentencing process" and "continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary." 543 U.S. at 263, 264-65 (citing 28 U.S.C. § 991(b)). *Zavala* undermines *Booker*'s design by holding that a district court commits reversible error if it accords the Guidelines range greater weight than any of the other § 3553(a) sentencing factors. *See* 443 F.3d at 1171.

Booker's sentencing scheme depends upon the Guidelines carrying substantial weight in the sentencing calculus, for the Guidelines "are the only *integration* of the *multiple* factors" listed in § 3553(a), *United States v. Jiménez-Beltre,* 440 F.3d 514, 518 (1st Cir. 2006) (en banc), and the "guideline range itself . . . is the principal means of complying" with Congress' goal of avoiding sentencing disparity, *United States v. Smith,* 445 F.3d 1, 6 (1st Cir. 2006). The Guidelines, "with important exceptions, . . . were based upon the actual sentences of many judges," and thus provide the sentencing court with empirical evidence of what most judges would consider an appropriate sentence based on all of the factors mandated by Congress. *Jiménez-Beltre,* 440 F.3d at 518; *see also United States v. Johnson,* 445 F.3d 339, 342 (4th Cir. 2006); *United States v. Shelton,* 400 F.3d 1325, 1332 n.9 (11th Cir. 2005). Moreover, the Guidelines reflect the Sentencing Commission's expertise and its efforts to synthesize the most up-to-date views of the judicial community. *See Booker,* 543 U.S. at 264; *United States v. Buchanan*, 2006 WL 1450686, *4-*5 (6th Cir. May 26, 2006) (Sutton, J., concurring).

Contrary to the panel majority, 443 F.3d at 1170-71, § 3553 does not mandate that the other sentencing factors be given equal weight with the Guidelines. Rather, § 3553 contemplates that the Guidelines will be given a

special role and substantial weight in the sentencing process. Section 3553(a)(6), for example, requires sentencing courts to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." The only practicable way for sentencing courts to comply with that statutory goal is to give the Guidelines substantial weight. *See Jiménez-Beltre*, 440 F.3d at 519 ("[t]o construct a reasonable sentence starting from scratch in every case would defeat any chance at rough equality which remains a congressional objective"). Moreover, § 3553(c)(2) requires sentencing courts to state orally and in writing specific reasons for imposing a sentence outside the Guidelines range. *See United States* v. *Fuller*, 426 F.3d 556, 565 (2d Cir. 2005) (*Booker* left "unimpaired" § 3553(c)'s requirement to articulate reasons); *Jiménez-Beltre,* 440 F.3d at 519 (similar). There is no similar requirement for any other sentencing factor, which confirms the Guidelines' unique role. *Cf. Jiménez-Beltre,* 440 F.3d at 518 (stating that "the guidelines cannot be called just 'another factor' in the statutory list").

Accordingly, it is not error (as *Zavala* assumes) to expect the proponent of a sentence outside the Guidelines range to articulate what facts and § 3553(a) factors support the proposed sentence. *See United States v. Rivera,* 2006 WL 1360933, at *2 (1st Cir. May 19, 2006) ("[t]he party seeking a non-Guidelines

sentence, whether the defendant or the government, bears the burden of providing the basis to support such a sentence"). Expecting the proponent of a non-Guidelines sentence to articulate the grounds therefor does not affect the sentencing court's independent duty to consider the § 3553(a) factors "outside the context of the Guideline range," as the district court recognized in this case (App. C, p. 28.)

Moreover, according the Guidelines substantial weight does not come "perilously close" to reviving the mandatory Guidelines scheme invalidated by *Booker*. *Zavala,* 443 F.3d at 1171. *Booker* found the original Guidelines scheme to be "mandatory" because it severely limited the grounds on which a district court could depart from the Guidelines, and in many cases no departure at all was legally permissible. *See Booker,* 543 U.S. at 234-35. Under the advisory Guidelines, a sentencing court is free to consider *any* fact relevant to the § 3553(a) factors, whether that fact is articulated by a party or discerned by the court on its own. A court is not barred by the fact that the Sentencing Commission has already taken account of a factor in fashioning the Guidelines range, or that a particular factor is discouraged or even forbidden by the Guidelines. The judge is permitted to consider the full range of § 3553(a) considerations before deciding what sentence to impose. The judge's only legal boundaries are the statutory maximum

and "reasonableness." According the Guidelines substantial weight does nothing to change those features, and it is the only way to fulfill *Booker*'s expectation that the advisory Guidelines will "promote uniformity in the sentencing process" and help "avoid excessive sentencing disparities." 543 U.S. at 263, 264-65.

For *Booker*'s advisory Guidelines system to achieve those purposes, it is essential that the Guidelines play an organizing role in the sentencing process and receive substantial weight in the sentencing calculus. This means, first, that a sentencing judge should calculate the Guidelines range as the "starting point" and should consider the applicability of any Guidelines departure factors. Second, the judge should consider whether there are facts relevant to other § 3553(a) factors which reasonably point to a non-Guidelines sentence as being sufficient to achieve the purposes of sentencing. Third, the judge should recognize that the avoidance of disparity requires serious consideration of the Guidelines and of whether a non-Guidelines sentence is in keeping with that goal. Finally, the judge should bear in mind that the further the proposed sentence varies from the Guidelines, the more compelling its justification should be. *See Smith,* 445 F.3d at 4.

The approach just outlined is substantially the one followed by the district court in giving Zavala a below-Guidelines sentence, yet the panel vacated the sentence because "[t]he sentencing transcript leaves us with the unsettling feeling

that the district court viewed the Guideline calculation not as one of several factors to be considered equally, but as a locus from which to deviate." *Zavala,* 443 F.3d at 1171. The district court's approach is consistent, and the panel's inconsistent, with *Booker.*

The Court en banc should take this opportunity to bring the circuit back to the approach envisioned by *Booker*, in which the Guidelines are given an organizing role in the sentencing process and substantial weight in the sentencing calculus. Only then will *Booker*'s expectation that the Guidelines promote consistency and fairness in sentencing be realized.

2. *Zavala* creates a conflict with other courts of appeals.

Zavala's departure from the path envisioned by *Booker* is further evidenced by the conflict *Zavala* creates with at least two other courts of appeals, the First and the Tenth Circuits.

In *Jiménez-Beltre,* the First Circuit, sitting en banc, upheld a Guidelines sentence where the sentencing judge announced that he intended to give the Guidelines "substantial weight," and that "if there are clearly identified and persuasive reasons why I should not impose a Guidelines sentence, I will consider those and impose a sentence accordingly." 440 F.3d at 516-17. The First Circuit addressed "what role the advisory guidelines should play in a post-*Booker*

sentence." *Id.* at 518. The court emphasized that "the guidelines cannot be called just 'another factor' in the statutory list, because they are the only *integration* of the *multiple* factors and, with important exceptions, their calculations were based upon the actual sentences of many judges." *Id.* (citations omitted). The court "agree[d] with the district court's general approach" in which the sentencing judge determines the Guidelines range, "including any proposed departures, followed by further determination whether other factors identified by either side warrant an ultimate sentence above or below the guideline range." *Id.* at 518-19. The court observed that § 3553(c) requires sentencing courts to articulate reasons for non-Guidelines sentences, *id.* at 519, and held that "the proponent of a factor that would work in the proponent's favor has to provide the basis to support it." *Id.*

Similarly, the Tenth Circuit in *United States v. Terrell*, 445 F.3d 1261, 1262 (10th Cir. 2006), addressed the question "whether a district court errs in giving the Guidelines 'heavy weight' in sentencing," and held that it does not. *Id.* at 1264. The court explained that while "district courts must consider all of the factors listed in § 3553(a)," *id.* at 1265, "[e]ven after *Booker*, deference to the Guidelines is essential 'to promote uniformity in sentencing so as to prevent vastly divergent sentences for offenders with similar criminal histories and offenses.'" *Id.* (quoting *United States v. Kristl,* 437 F.3d 1050, 1054 (10th Cir. 2006)); *see also United*

States v. Bryant, 2006 WL 1227748, at *2 (8th Cir. May 9, 2006) (guidelines, although "no longer mandatory, . . . continue to be guideposts that must be respected, lest we see a return to the unwarranted sentencing disparities that resulted in the adoption of the guidelines themselves"); *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005) ("The Guidelines remain an essential tool in creating a fair and uniform sentencing regime across the country."); *United States v. Crosby*, 397 F.3d 103, 113 (2d Cir. 2005) (*Booker* "do[es] more than render the Guidelines a body of casual advice, to be consulted or overlooked at the whim of a sentencing judge").

There is a clear circuit conflict over the proper role and weight of the advisory Guidelines in sentencing. The First and Tenth Circuits have held that the Guidelines are not just another sentencing factor, and that it is proper for district courts to accord the Guidelines range "substantial weight," "heavy weight," and "deference." *Zavala* holds, on the other hand, that "[d]istrict courts . . . must not accord [the Guidelines calculation] greater weight than they accord the other § 3553(a) factors." 443 F.3d at 1171. At Zavala's sentencing, the district court proceeded in a manner which closely approximated the approach endorsed by the First and Tenth Circuits. The *Zavala* panel, however, vacated the district court's "thoughtful[ ]" below-Guidelines sentence, because the court failed to treat the

"Guideline calculation . . . as one of several factors to be considered equally." *Id.* The Court sitting en banc should resolve the inter-circuit conflict.

3. *Zavala* threatens to throw district courts into confusion over the proper role of the Guidelines under *Booker*.

While *Zavala*'s reasoning is opaque, its message is unmistakable: district courts, on pain of reversal, must not give a *hint* of deference to the Guidelines, nor show *any* "resistance" to sentencing outside the Guidelines range. *See id.* at 1170-71. Contrary to *Booker*'s design, *Zavala* casts the district courts adrift with no meaningful benchmarks for sentencing. The Court en banc should dispel the confusion caused by *Zavala* and give the district courts clear guidance, consistent with *Booker,* on the proper role of the Guidelines at sentencing.

CONCLUSION

For the reasons stated above, this Court should grant the Petition for Rehearing and for Rehearing En Banc.

RESPECTFULLY SUBMITTED this 8th day of June, 2006.

THOMAS E. MOSS
UNITED STATES ATTORNEY

By: _____
ALAN G. BURROW
Assistant United States Attorney

IN THE UNITED STATES COURT OF APPEALS

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UNITED STATES OF AMERICA, Plaintiff, v. JUAN ANTONIO ZAVALA, Defendant.	)	Case No. 05-30120

On Appeal From the United States District Court
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Honorable B. Lynn Winmill, District Court Judge

BRIEF IN OPPOSITION TO UNITED STATES' PETITION FOR REHEARING AND FOR REHEARING EN BANC

DENNIS M. CHARNEY, ISB #4610
Attorney at Law
951 East Plaza Drive, Suite 140
Eagle, Idaho 83616
Telephone: (208) 938-9500
Facsimile: (208) 938-9504

Attorney for Defendant

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PRELIMINARY STATEMENT

A panel of this Court issued a decision on the appeal of Juan Antonio Zavala from a 30-year sentence of imprisonment for dealing in methamphetamine. *United States v. Zavala*, 443 F.3d 1165 (9th Cir. 2006) (*per curiam*) (App. A). The only issue before this Court on appeal was whether the district court committed legal error in sentencing Zavala when that court "'presumed' that the advisory Sentencing Guideline calculation set forth the proper range for sentencing." *Id.* at 1166. This Court found that such an approach constituted legal error and vacated and remanded. *Id.*

In approaching the issue before it, this Court first acknowledged that "district courts, while not bound to apply the Guidelines, *must* consult those guidelines and take them into account when sentencing." *Id.* at 1168 (emphasis added). This Court narrowly tailored its inquiry to a consideration of "how a district court should 'consult' and use the advisory Guideline calculation when it decides a case." *Id.* This Court rejected Zavala's argument that even to use the Guidelines as a "starting point" constituted legal error, and instead conducted its inquiry from the premise that this Court had already held that not only must district courts consult the Guidelines, but that they must "use the Guidelines as a starting point." *Id.* at 1169 (internal quotations and citations).

The government characterizes *Zavala* as a sweeping decision capable of "cast[ing] adrift" sentencing courts in a sea of confusion and "mak[ing] it nearly impossible" for those courts to "avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." (Petition for Rehearing and for Rehearing En Banc, p. 3 (quoting 18 U.S.C. § 553(a)(6).) A proper reading of *Zavala* shows that this Court reaffirmed that sentencing courts must use the Guidelines as their starting point, and only held that those courts must not "make the Guideline calculation *the* presumptive sentence" and "will commit legal error" if they do. *Zavala*, 443 F.3d at 1170 (emphasis in original).

Far from "leav[ing] sentencing courts at sea," *Zavala* provides just the "clear, correct, and useful guidance" the government purports to seek through its Petition for Rehearing and for Rehearing En Banc. (Petition, p. 2.) For this reason, this Court should deny the government's Petition.

QUESTION PRESENTED

Whether a district court commits reversible error when it makes the Guideline calculation the presumptive sentence and requires a defendant to provide reasons for deviating down from the guideline range.

STATEMENT

1.a. A jury convicted Juan Antonio Zavala of conspiracy to traffic in more than 500 grams of methamphetamine and distribution of 50 grams or more of methamphetamine, in violation of 21 U.S.C. §§ 841 and 846. (App. B., Sentencing Order, p. 1.)

1.b. Due to a series of decisions by the Supreme Court and this Court prior to during sentencing (*Blakely v. Washington*, 542 U.S. 296 (2004); *United States v. Ameline*, 376 F.3d 967 (9th Cir. 2004); *United States v. Booker*, 543 U.S. 220 (2005), the parties agreed to try sentencing issues to the court. *Id.* at 2.

The court found that the Guideline calculation would result in a life sentence for Zavala for the offenses of which the jury convicted him. *Id.* at 3-5. The judge stated that "[m]y own view is that the Guideline range becomes a presumptive sentence, and it is then for the Court to determine whether or not a specific factor exists in this case . . . which would justify the Court in imposing a lesser sentence." (App. C, pp. 4-5.) The judge further stated that "the burden is upon, I think, the Defense to at least explain to me what those justifications are . . . that will justify the Court in imposing a sentence short of life imprisonment." (App. C, pp. 4-5.)

Defense counsel argued that the starting point for analysis of what sentence is appropriate for a defendant should be the statutory minimum for the offense at issue. *Id.* at 15. The judge disagreed, but eventually found that a life sentence was

not necessary to accomplish the sentencing purposes of 18 U.S.C. § 3553. *Id.* at 30-32. Instead, the judge sentenced Zavala to 360 months of imprisonment, ten years of supervised release, a $500 fine, and a $200 special monetary assessment. *Id.* at 33, 35.

2.a. Zavala appealed his sentence on the ground that "the district court violated *Booker* when it 'presumed' that the advisory Sentencing Guideline calculation set forth the proper range for sentencing." *Zavala*, 443 F.3d at 1166. This Court took note of the fact that "[a]t the commencement of the sentencing hearing, the district court assumed that the calculated 'Guideline range becomes a presumptive sentence . . . ." *Id.* This Court also took note of the fact that "the district court declared that the burden was on Zavala to explain any justification for imposing a different sentence—one below life imprisonment." *Id.*

This Court reaffirmed that the district courts must "consult" the Guideline calculation, and further, that those courts should use the Guidelines as a "starting point" for arriving at the appropriate sentence. *Id.* at 1168-69. This Court further circumscribed its opinion only to "consider how a district court should 'consult' and use the advisory Guideline calculation when it decides a case." *Id.* at 1168. The Court declined to take up the issue of "whether a reviewing court should entertain the presumption that a sentencing decision which does fall within the Guideline range is reasonable." *Id.*

This Court then held that using the Guidelines as a "starting point" does *not* mean that district courts should use them as a presumption. *Id.* at 1169. The Court then summarized its reasoning for this holding by stating: "Simply put, a presumption at the district court would give undue weight to the Guidelines. *Id.* at 1170. This Court then justified its conclusion by characterizing the "difference between starting points and presumptions." *Id.* The Court explained that starting points "bespeak[] all the nuances and possibilities of the human condition that district judges are so good at perceiving." *Id.* Presumptions, on the other hand, "bespeak[] a mind which is rather closed unless it can be pried open by something truly extraordinary." *Id.*

2.b. Against this background, the Court then turned to a consideration of "what the district court did in this case." *Id.* at 1171. This Court found that the district court "treated the Guideline calculation as a presumptive sentence from which it had discretion to depart, if the defendant provided satisfactory reasons." *Id.* This Court found especially "troubling" the fact that the district court "placed the onus on Zavala to provide reasons for deviating downward from the Guideline range . . . ." *Id.* The Court found this approach to constitute legal error, and then found that the government had failed to meet its burden of showing that the error was more probably harmless than not. *Id.* This Court therefore vacated Zavala's sentence and remanded the case to the district court for re-sentencing.

2.c. Judge Fernandez did not dissent on the basis that he disagreed with the majority's rationale of its decision. *Id.* at 1172. Instead Judge Fernandez dissented because he believed that the district court did not actually treat the Guideline calculation as a presumptive sentence, the "not entirely felicitous" language of the district court notwithstanding. *Id.*

REASONS FOR DENYING THE PETITION

1. The Holding in Zavala Is Restrained in Scope and Clear in Providing Guidance for District Courts

Contrary to the government's assertion, the holding, reasoning, and even dicta of this Court in *Zavala* is far from "opaque." (Petition, p. 18.) The only issue before this Court in *Zavala* was whether "the district court violated *Booker* when it 'presumed' that the advisory Sentencing Guideline calculation set forth the proper range for sentencing." *Zavala*, 443 F.3d at 1166. The answer in the Ninth Circuit after *Zavala* is clearly "yes." The message to district courts could not be much clearer: the Guideline calculation is not a *presumptive* sentence.

This Court also acknowledged, addressed and then rejected Zavala's argument the "even treating [the Guidelines] as a starting point was legal error." *Id.* at 1168. The Court reiterated what is already the law in the Ninth Circuit: "a district court should use the Guidelines as a 'starting point.'" *Id.* at 1169. The

holding in *Zavala* is clear, and hardly leaves district courts "at sea" as to the state of the law.

2. *Zavala* Is Well-Reasoned

The reasoning in *Zavala* is also clear: to treat the Guideline calculation as a presumptive sentence "would give undue weight to the Guidelines." *Id.* at 1170. As happened in this case at the district court level, a judge's belief that the Guideline range is the presumptive sentence invites that judge to place the burden of rebutting that presumption on the defendant. This Court properly found this "troubling." *Id.* at 1171.

3. *Zavala* Correctly Declined to Follow the Approach of the First and Tenth Circuits

The government takes issue mainly with language in *Zavala* to the effect that the Guideline calculation is only one factor among several that sentencing courts must take into consideration. The government considers that the Guidelines "are *the* critical tool" in achieving appropriate sentences, and seeks rehearing of this case to obtain a declaration to that effect. (Petition, p. 3.) Essentially, the government wishes this Court would follow the First and Tenth Circuits.

In useful dicta, the Court quite properly and clearly declined the government's invitation to follow the aforementioned circuits. As the government observes, the guidelines "are the only *integration* of the *multiple* factors" that a

judge must consider in imposing a sentence. (Petition, p. 16 (*quoting United States v. Jimenez-Beltre*, 440 F.3d 514, 518 (1st Cir. 2006) (en banc).) The very nature of the Guideline calculation as an integration of multiple factors gives it more "weight" than the other factors. It is not necessary for this Court to pronounce the Guideline calculation "more equal" than the other factors of 18 U.S.C. § 3553—and to do so would be dangerous.

Booker properly and happily reintroduced a measure of judicial discretion to the sentencing process that was lacking under the mandatory sentencing scheme. By seeking to add more weight to the Guideline calculation, the government seeks to move the Ninth Circuit back toward the old mandatory system. It would seem that a fundamental disagreement exists between the government approach and that of this Court in *Zavala*. The government sees the Guideline calculation as the "critical tool" in achieving appropriate sentences. This Court's approach in *Zavala* was to make judicial discretion the critical tool.

The government approach eschews starting points in favor of presumptions. This Court eloquently captured the difference in mindsets:

> The former bespeaks a mind open to all the nuances and possibilities of the human condition that district judges are so good at perceiving. The latter bespeaks a mind which is rather closed unless it can be pried open by something truly extraordinary."

Zavala, 443 F.3d at 1170.

Certainly reasonable minds can differ on which approach is preferable, but under *Booker*, our system of government displays a preference for judicial discretion.

CONCLUSION

For the reasons stated above, this Court should deny the United States' Petition for Rehearing and for Rehearing En Banc.

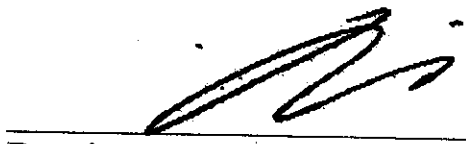
RESPECTFULLY SUBMITTED this 3rd day of July, 2006.

Dennis M. Charney
Attorney for Defendant-Appellant

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached document is proportionately spaced, has a typeface of 14 points or more, and contains 1974 words.

DATED this 3rd day of July, 2006.



Dennis M. Charney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of July, 2006, I caused a true and correct copy of the foregoing document to be mailed and/or faxed to the following:

Alan Burrow
US Attorney's Office
800 Park Blvd., Ste. 600
Boise, Idaho 83712
Fax: **334-1414**

DENNIS M. CHARNEY